Washington and Lee Law Review

Volume 32 | Issue 2 Article 5

Spring 3-1-1975

Bekins Moving & Storage Company-Denial Of Certification To Unions Practicing Invidious Discrimination

BEKINS MOVING & STORAGE COMPANY—DENIAL OF CERTIFICATION TO UNIONS PRACTICING INVIDIOUS DISCRIMINATION

Since the inception of federal labor laws,[1] the task of maintaining the tenuous bargaining power relationship between employee and employer has been primarily within the purview of the National Labor Relations Board.[2] Though the main concern of the National Labor Relations Board (NLRB or Board) initially centered upon obtaining economic necessities for individual employees[3] through the benefits of organization, respect for employees' civil rights and freedom to enjoy such benefits has come to demand increasing NLRB consideration.[4] The Board's decision in *Bekins Moving & Storage Co.*,[5] that under certain circumstances certification[6] could be denied to a union practicing invidious discrimination[7] in its membership policies, represents a critical juncture in decisions affecting the re-

[1] National Labor Relations Act, ch. 372, 49 Stat. 449 (1935), *as amended*, Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136, *as amended*, Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, §§ 701-707, 73 Stat. 541, 29 U.S.C. §§ 141-68 (1970).

[2] 29 U.S.C. §§ 153, 160 (1970); *see* Allied Chem. & Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 166 (1971).

[3] *E.g.*, J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

[4] *E.g.*, Alden Press, Inc., 212 N.L.R.B. No. 91, 86 L.R.R.M. 1605 (1974); Bell & Howell Co., 213 N.L.R.B. No. 79, 87 L.R.R.M. 1172 (1974); Defender Security & Investigation Servs., Inc., 212 N.L.R.B. No. 23, 86 L.R.R.M. 1490 (1974); Grants Furniture Plaza, Inc., 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175 (1974); El Diario Publishing Co., 114 N.L.R.B. 965 (1955).

[5] 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (1974).

[6] Certification is the final approval by the N.L.R.B. of a representative elected by the majority of a group of employees to be the bargaining representative of those employees. The procedures leading to such an election and provision for certification are contained in 29 U.S.C. § 159(c). For the benefits accruing to a representative through certification, see note 21 *infra*.

[7] Invidious discrimination is defined as discrimination which is inherently suspect, and therefore subject to close judicial scrutiny. *See* Frontiero v. Richardson, 411 U.S. 677, 682 (1973). To constitute "invidious" discrimination the basis of the discrimination must relate to characteristics determined solely by the accident of birth which are unrelated to non-suspect characteristics of intelligence, physical disability, or skill. *Id.* at 686-87. The Supreme Court has characterized discrimination on the basis of race, alienage, and national origin as invidious discrimination. Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); Loving v. Virginia, 388 U.S. 1, 9 (1967) (race); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (race); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (race); Oyama v. California, 332 U.S. 633, 644-46 (1948) (national origin-race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin-race).

sponsibility of unions to refrain from practices denying organizational rights to employees on the basis of race, national origin, or alienage.

In *Bekins,* the NLRB stated for the first time that it would consider objections to the certification of a union, after its election as the employees' bargaining representative,[8] upon a prima facie showing that the union discriminated on the basis of race, national origin, or alienage in its membership policies.[9] A majority of the Board[10] agreed that the NLRB was proscribed by the due process clause of the fifth amendment from certifying a union found guilty of such practices.[11] Additionally, two members of the Board stated that certification should be denied where evidence revealed a union "to have a propensity to fail fairly to represent employees."[12] Thus, the Board's analysis outlined two distinct violations which may trigger a denial of certification.

The first violation centers upon the denial of union membership to an employee on the basis of invidious discrimination. A majority of the Board considered such union action if condoned through certification by the NLRB a due process violation of the fifth amendment. The Board stated that as an agency of the federal government it cannot bestow the benefits of a federal statute upon one engaged in such discriminatory practices.[13] The dissenting opinion stated that denial of union membership on discriminatory grounds was not in any way a constitutional issue meriting denial of certification. Rather, the dissenting members maintained that proper remedies to rectify membership discrimination were found in specific post-certification procedures under the National Labor Relations Act (NLRA) and the Civil Rights Act of 1964.[14]

---

[8] 86 L.R.R.M. at 1325.

[9] *Id.* at 1325, 1329.

[10] The Board consists of five members appointed by the President by and with the consent of the Senate. 29 U.S.C. § 153 (1970). The majority, in regard to the due process proscription on the Board's actions, consisted of three members of the present Board: Chairman Miller and Member Jenkins in the majority opinion, and Member Kennedy in the concurring opinion.

[11] 86 L.R.R.M. at 1325, 1329.

[12] *Id.* at 1326. Chairman Miller and Member Jenkins expressed this opinion.

[13] 86 L.R.R.M. at 1325, 1329.

[14] The dissenting opinion stated:

> We dissent. We do so, even though we neither approve nor condone discriminatory practices on the part of unions, because we believe that withholding certification in the circumstances indicated is neither required by the Constitution nor permitted by the provisions of the Act [NLRA]. . . .
>
> . . . [I]t is important to note that certification of a union as an exclusive representative not only gives the union the statutory right

The second violation concerned a union's failure to represent fairly employees. Default in this responsibility would constitute a breach of the union's duty of fair representation.[15] Two members of the Board believed a breach of the duty of fair representation to be a constitutional violation requiring denial of certification.[16] A majority of the Board, however, did not agree with this interpretation. Rather, it stated that the duty of fair representation was statutory under the NLRA,[17] and that any breach of that duty was ripe for consideration only after certification.[18] Therefore, a majority of the Board, formed by the concurring and dissenting members, did not consider any violation of such a duty in regard to race, sex, alienage, or national origin as a basis for denying certification.[19] The two dissenting members of the Board reasoned, as they had with regard to possible membership discrimination, that the proper way to rectify discrimination in repre-

---

> to bargain for the employees, it also imposes the obligation upon the union fairly to represent all employees. . . .
> . . . [T]he certification of a union . . . operates to create the necessary condition for permitting the sanction of law and government to run against the offending practices. . . .
> . . . [W]e reject the argument that Board action which will operate to clothe Petitioner with a statutory . . . responsibility, vis-a-vis the employees it represents, somehow and in some way contravenes the due process clause of the fifth amendment.

Id. at 1332-33. *See also* note 20 *infra.*

[15] The duty of fair representation constitutes the responsibility of an exclusive bargaining representative to represent fairly all employees regardless of the racial, sexual, or ethnic status of those employees. 86 L.R.R.M. at 1326, 1330-31, 1332-33.

[16] *Id.* at 1326.

[17] *Id.* at 1330-31, 1333. The duty of fair representation is stated to be implicit in § 9(a) of the NLRA. 29 U.S.C. § 159(a) (1970). *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953). Section 9(a) provides that the representative designated or selected by a majority of a group of employees shall be the exclusive representative for such employees. Due to the exclusive status of the representative, a reciprocal duty of fairly representing all employees is implied. *See* text accompanying notes 30-33 *infra.*

[18] 86 L.R.R.M. at 1331, 1332-33. The dissenting opinion stated that the duty of fair representation "may be" or "possibly" is constitutional as well as statutory, but only after certification. In the context of *Benkins,* the dissent, Members Fanning and Penello, did not believe that the duty applied because the union in question was not certified. *Id.* at 1332-33. A violation of the duty could not logically be used to deny certification, for the duty was not established until certification occurred.

The concurring opinion, which with the dissenting opinion formed the majority on this issue, believed the duty of fair representation to be always statutory in nature, even after certification. Therefore, constitutional issues never emerged from a violation of such a duty. *Id.* at 1330-31. The concurring opinion appears to be correct in its interpretation that the duty of fair representation is always statutory. *See* text accompanying notes 110-43 *infra.*

[19] 86 L.R.R.M. at 1330, 1332-33.

sentation policies was provided in specific post-certification procedures.[20]

In view of the disagreement within the Board as to the constitutional or non-constitutional nature of membership and representation discrimination and in view of the import of the decision to future organizational and personal right controversies, *Bekins Moving & Storage Co.* merits careful scrutiny and analysis. When applied to a union found guilty of membership discrimination on the basis of race, alienage, or national origin, the decision effectively prevents such a union from exercising the prerogatives which would be given to it as a certified representative.[21] The possibility of denying a union such benefits will almost certainly lead to increased employer challenges to union certification on the basis of alleged discrimination.[22] Also, for minority employees seeking to exercise the right of self-organization[23] and to be represented fairly by their bargaining representative, the decision in *Bekins* portends serious consequences.

In *Bekins,* a charge of race and sex discrimination against the union, Local 390 of the International Brotherhood of Teamsters, was made by the employer, Bekins Moving & Storage Co., of Florida, Inc., at a pre-election hearing.[24] The basis of the membership discrimina-

[20] *Id.* at 1332. *See also* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 253, *as amended,* Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 662, *as amended,* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C. § 2000e *et seq.* (Supp. III, 1973).

[21] The N.L.R.B. stated in its 1973 Annual Report that certification affords the statutory benefits of stability, security, and permanency to the bargaining relationship and prevents challenges by other unions to the majority status of the certified union for a period of one year. 38 N.L.R.B. ANN. REP. 56 (1973). *See* General Box Co., 82 N.L.R.B. 678, 680-82 (1949).

[22] The fact that increased employer challenges to union certification would result from the possibility of denying certification benefits to a union is already evident. *See* cases cited at note 4 *supra.*

[23] The right of employees to organize, form, join, or assist a labor organization is set forth in § 7 of the N.L.R.A. 29 U.S.C. § 157 (1970).

[24] The basic purposes of a pre-election hearing are to determine whether an election of a bargaining representative is warranted, and also to determine the appropriate units for any subsequent elections. 29 U.S.C. § 159(c)(1) (1970). Section 159 provides for a pre-election hearing when the Board has reasonable cause to believe that a question of representation exists. The tenor of such a hearing is non-adversary and informal. Inland Empire Dist. Council v. Millis, 325 U.S. 697, 706 (1945). But the employer's charge is made with adverse intentions to deny the union's placement on the ballot for election. *See* Bekins Moving & Storage Co., 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323, 1324 (1974). The Board does not consider the pre-election hearing to be the appropriate proceeding for consideration of such contentions by the employer. *Id.* at 1328. *See also* Defender Security & Investigation Servs., Inc., 212 N.L.R.B. No. 23, 86 L.R.R.M. 1490 (1974); Alden Press, Inc., 212 N.L.R.B. No. 91, 86 L.R.R.M. 1605

tion charge was the apparent disparity between the percentages of Spanish-surnamed and female members in the union and the percentages of those two groups in the available labor force in the surrounding area.[25] According to the employer, these disparities pointed to the union's discrimination against these groups in its membership policies.[26] The employer therefore requested[27] that the union's petition for an election be denied, arguing that to hold an election[28] for a discriminating union would violate the due process clause of the fifth amendment.[29]

The Board accepted the argument of the employer with regard to the due process issue of union membership discrimination on the basis of race, national origin, and alienage. The Board, however, did not agree that sex discrimination was as inherently suspect as race, national origin, and alienage to warrant denial of certification.[30] At the same time, although the Board appeared to agree with the employer as to certain of the union's discriminatory actions, it stated that consideration of certification denial on the basis of invidious discrimination would have to wait until after the union won elec-

(1974). The reasons why a pre-election hearing is not the proper proceeding are discussed in the text accompanying notes 63-72 *infra*.

[25] Brief for Respondent at 29-30, Bekins Moving & Storage Co., 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (1974). The percentages were as follows:

	Local 390	Miami Area
Spanish	12.5%	23.6%
Women	12.5%	49.2%

The statistics were based upon information provided in the affidavit of the union (percentages of the two groups' membership in the union in relation to total union membership) and by information contained in the General and Social Economic Characteristics of Florida as filed by the U.S. Department of Commerce Social and Economics Statistics Administration Bureau of the Census (percentages of the two groups in the available labor force in relation to the total available labor force). *Id.*

[26] *Id.* at 30. To support this contention, the employer relied upon the statement in N.L.R.B. v. Mansion House Center Management Corp., 473 F.2d 471, 477 (8th Cir. 1973), that such disparities in statistical evidence can clearly demonstrate discriminatory practices. The applicability of such statistical evidence to support a contention of union membership discrimination is analyzed in the text accompanying notes 89-99 *infra*.

[27] Brief for Respondent at 30, *supra* note 25; 86 L.R.R.M. at 1324.

[28] *See* note 24 *supra*, for procedures leading to an election and considerations involved in a pre-election hearing.

[29] Brief for Respondent at 30, *supra* note 25. Although the employer did not expressly argue that due process would be violated, reference was made to the principles involved in N.L.R.B. v. Mansion House Center Management Corp., 473 F.2d 471 (8th Cir. 1973). The *Mansion House* decision premised the argument of not making available procedures of the N.L.R.B. to a violative union on fifth amendment due process grounds. *Id.* at 472-73.

[30] 86 L.R.R.M. at 1330 n.29, 1332. *See* note 88 *infra*.

tion.[31] The Board acknowledged in the majority and concurring opinions that as an agency of the federal government its actions were limited by the due process clause of the fifth amendment.[32] However, the Board reasoned that only by conferring the benefits of certification upon a union engaged in invidious discrimination would the power of the Federal Government "appear to be sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment."[33]

The Board's statement is well reasoned and is supported by court decisions which have held various government agencies to be in violation of the due process clause when those agencies "indirectly"[34] or through "knowing acquiescence"[35] support racial discrimination.[36] If the NLRB failed to inquire into charges of racial discrimination in the union's membership policies or ignored such discriminatory policies, the NLRB would be "indirectly" or with "knowing acquiescence" permitting the union to continue such practices with the added protection of certification.[37] The Board sought to assume its constitutional duty by stating that it would consider charges of discrimination after election of a union but before certification.[38] The effect of permitting such membership discrimination is to limit a minority individual's exercise of liberty. However, if a proper government objective can be shown, it is possible for an agency to justify apparent

---

[31] *Id.* at 1327, 1330.

[32] *Id.* at 1325, 1329-30. *See* note 10 *supra. See also* Public Util. Comm'n v. Pollak, 343 U.S. 451, 461-62 (1952), where the Supreme Court stated that although the due process clause is not applicable to private persons, due process considerations proscribe recognition or aid to any such private discrimination by an agency or arm of the federal government. This limitation is placed upon the NLRB as part of the federal government. *See* NLRB v. Nash-Finch Co., 404 U.S. 138, 141 (1971).

[33] 86 L.R.R.M. at 1325. *See id.* at 1330.

[34] Green v. Connally, 330 F. Supp. 1150, 1164 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

[35] Gautreaux v. Romney, 448 F.2d 731, 737 (7th Cir. 1971).

[36] *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 969 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964). Such indirect or knowingly acquiescent support of discrimination on the basis of alienage or national origin would also be violative of the fifth amendment. National origin and alienage, like race, are invidious forms of discrimination, and therefore are logically subject to the same close judicial scrutiny as established by the decisions in Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), and Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971). *See* note 7 *supra.*

[37] *Bekins,* 86 L.R.R.M. at 1330, 1332-33.

[38] *Id.* at 1327, 1330.

discriminatory practices.[39] The Supreme Court set forth the requirements necessary to defend against a charge of discrimination in regard to employment practices[40] in *Griggs v. Duke Power Co.*[41] Mr. Chief Justice Burger, speaking for the Court, stated that there must be a "business necessity" which is "related to job performance" behind any exclusion of minorities.[42] Furthermore, if there is an overriding business purpose that justifies such discrimination, there must also be no acceptable alternative plan to effectuate the same business purpose without discrimination.[43] There can be no valid government objective in certifying a union which invidiously discriminates in its membership policies.[44] Where membership or employment exclusion is merely premised on arbitrary and artificial barriers such as race and sex,[45] the exclusion fails to fall within the "business necessity" test.[46] Therefore, certification should properly be denied a union which discriminates in its membership policies because of the proscription on individual freedom that such discriminatory practices represent.

The first noteworthy application of these principles in regard to racial discrimination in labor unions emerged from the decision of the Eighth Circuit in *NLRB v. Mansion House Center Management Corp.*[47] In *Mansion House,* the Eighth Circuit denied enforcement of a Board order requiring an employer to bargain with a union practicing racial discrimination in its membership policies.[48] As the *Mansion House* court stated, "membership in a union is often the *sine qua non* for obtaining employment in most skilled crafts in the country; it

---

[39] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[40] These requirements apply to unions because of the direct employment benefit that union membership gives an employee in terms of bargaining power with an employer. United States v. International Longshoremen's Ass'n, 460 F.2d 497, 503 (4th Cir.), *cert. denied,* 409 U.S. 1007 (1972); Local 189, United Papermakers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). *See also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

[41] 401 U.S. 424 (1971).

[42] *Id.* at 431.

[43] Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *petition for cert. dismissed,* 404 U.S. 1006 (1971); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); Local 819, United Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).

[44] Discrimination created or supported by the federal government on the basis of race, alienage, or national origin is uniformly rejected. *See* cases cited in note 7 *supra.*

[45] For discussion on sex discrimination issues see note 88 *infra.*

[46] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[47] 473 F.2d 471 (8th Cir. 1973).

[48] *Id.* at 475.

frequently spells the difference between lucrative employment and exclusion from the craft."[49] Thus, a union which discriminates in membership on the basis of arbitrary considerations such as race deprives the excluded minorities of employment opportunities and benefits.[50] Although the Eighth Circuit in *Mansion House* was confronted with an unfair labor practice charge[51] brought against an employer by a certified union, the court concluded generally that "[f]ederal complicity through recognition of a discriminating union" violates basic constitutional principles.[52] Therefore, the court denied enforcement of an NLRB order directing the employer to refrain from an unfair labor practice. Availability of the remedial machinery and procedures of the NLRB to the union constituted "federal complicity" in union discrimination.[53] Therefore, if the certification processes of the Board, by conferring benefits upon the union in the final act of certification itself,[54] constitute "federal complicity" then *Mansion House* supports the decision of the Board in *Bekins.*

The Eighth Circuit in *Mansion House* referred to a prior NLRB decision, *Independent Metal Workers, Local 1,*[55] to define its "federal complicity" proposition. In *Independent Metal Workers,* the Board

[49] *Id.* at 472.

[50] *Id.*

[51] An unfair labor practice charge may be brought before the Board for any unfair labor practice enumerated in § 8 of the NLRA. 29 U.S.C. § 158 (1970). 29 U.S.C. §160 (1970). In *Mansion House,* the unfair labor practice charge was brought by the union against the employer for the latter's refusal to bargain in violation of § 8(a)(5) of the NLRA. 29 U.S.C. § 158(a)(5) (1970).

[52] 473 F.2d at 477. Jurisdiction over the issue of whether an employer could be required by the Board to bargain with a union that discriminates in membership policies was expressly reserved from a prior decision, NLRB v. Mansion House Center Management Corp., 466 F.2d 471 (8th Cir. 1972), involving the same parties.

In the later *Mansion House* decision, 473 F.2d 471 (8th Cir. 1973), a violation of the due process clause of the fifth amendment was recognized even though that amendment, unlike the fourteenth amendment, has no equal protection clause. The Eighth Circuit decision in *Mansion House* and prior decisions of the Supreme Court reasoned that discrimination may be so invidious as to be tantamount to a violation of due process concepts. *Id.* at 473; *see* Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

Furthermore, the Supreme Court has held that the due process clause of the fifth amendment and the equal protection clause of the fourteenth amendment prescribe the same limitation on federal and state action in situtations analogous to *Bekins.* Colorado Anti-Discrimination Comm'n v. Continental Airlines, 372 U.S. 714, 721 (1963).

[53] 473 F.2d at 477.

[54] *See* text accompanying notes 69-72 *infra,* discussing that the final act of certification itself represents "federal complicity." Such complicity should not be recognized in the hearing and elections procedures leading to certification.

[55] 147 N.L.R.B. 1573 (1964).

was confronted with the problem of two locals with racially segregated memberships representing employees of the same plant. The Board concluded that the certifications of both locals should be rescinded. The basis for the rescission was the denial of eligibility for full and equal membership caused by the racial segregation of the member employees. Although the Board was not confronted with a request for new certification, it stated that unions which exclude employees from membership on racial grounds could not obtain or retain certified status under the NLRA.[56] The decision expressly overruled prior decisions of the NLRB holding that certification could issue to or be retained by discriminatory unions.[57] Because the *Mansion House* court utilized this decision to explicate its use of the term "federal complicity,"[58] it established a precedent from which the Board in *Bekins* could and did logically extrapolate its reasoning to deny certification to a union guilty of invidious discrimination in membership practices. In combining the general principles of due process mentioned in prior cases[59] with the more explicit language of *Mansion House* in regard to NLRB complicity in racially discriminatory membership practices, the holding in *Bekins* appears to be appropriate.

The importance of the Board's decision can in part be measured by the benefits which are denied to a union barred from certification. As the NLRB has stated,[60] certification gives a union stability, security, and permanency in its bargaining position with an employer. Normally, other unions are prevented from challenging the majority status given to a union by its election and certification for a period of one year.[61] Under the holding in *Bekins*, these benefits are denied a violative union, and thus subject its status as bargaining representative to challenges from other unions for the right to represent groups of employees. Also, in light of the disruption to the organizing activities of employees or unions that denial of certification can represent, employer challenges to certification are likely to increase.[62] Therefore, employers can seriously affect union representation if proof of mem-

[56] *Id.* at 1578.

[57] Atlanta Oak Flooring Co., 62 N.L.R.B. 973 (1945). Laurus and Brothers, Co., 62 N.L.R.B. 1075 (1945). Other relevant decisions of the Board include Pioneer Bus Co., 140 N.L.R.B. 54 (1962); Hughes Tool Co., 104 N.L.R.B. 318 (1953). *See also* Coleman Co., 101 N.L.R.B. 120 (1952) which recognized the relevancy of racial discrimination in determining certification status and the benefits proscribed under the NLRA in regard to a discriminating union.

[58] 473 F.2d at 473.

[59] *See* notes 32, 34-36 *supra.*

[60] 38 N.L.R.B. ANN. REP. 56 (1973).

[61] *Id.*

[62] *See* note 22 *supra.*

bership discrimination in each case is sufficient to convince the Board that it cannot constitutionally certify such a union. Questions remain, however, as to when and by what procedures charges of discrimination in membership policies may be raised.

In *Bekins,* the employer challenged the right of a discriminatory union to seek an election or, in the alternative, to be certified at a pre-election hearing. However, the majority of the Board declared that a precertification inquiry need not be made at the original hearing before election. Only after the union involved has received a majority of the valid votes cast will the Board consider such an objection.[63] Although agreeing that the question of a union's representative status should be acted upon expeditiously, the Board, citing its increasing caseload and limited resources, deemed it unwise to tax itself by considering the issue at the pre-election hearing.[64] Additionally, the Board recognized that if the union failed to receive a majority of valid votes cast, the question of denying certification would be rendered moot.[65] Finally, the Board believed that the information provided in a post-election hearing by a Hearing Officer would be of greater benefit to the Board:

> Unlike the original pre-election hearing, a post-election hearing can. . .culminate in the issuance of a report and recommendations by a Hearing Officer, and affords the parties an opportunity to file exceptions and briefs. Limiting the litigation of the disqualification issue on the post-election hearing would thus give us the benefit of credibility resolutions, where needed, and recommendations; and at the same time, the litigants' rights to procedural due process would be fully protected.[66]

The question arises, however, as to whether due process compels a determination of the status of the union at the pre-election stage. Although the Board concluded that it would be unconstitutional to make certification available to a discriminatory union, the Board did not give close scrutiny to whether the governmental functions per-

---

[63] 86 L.R.R.M. at 1327.

[64] *Id.*

[65] In fact, this was the situation that resulted in the subsequent election proceedings concerning Local 390 of the Teamsters Union, the local invoved in *Bekins.* Local 390 lost the election by a vote of 34 to 9 and therefore, a post-election hearing to consider the question of denying certification because of racial and sexual discrimination became unnecessary. Letter from T. Moore, Office of the General Counsel—National Labor Relations Board to Thomas Pace, Washington, D.C., Sept. 10, 1974.

[66] 86 L.R.R.M. at 1327.

formed at the pre-election stage for the union could be sufficient "federal complicity" to justify a constitutional claim.[67]

The Board actually confers no substantial benefits on a union until the final act of certification itself. Therefore, it appears that the Board neither aids nor recognizes discriminatory membership practices by making its pre-certification procedures available to a potentially discriminatory union. As the Supreme Court noted in *Inland Empire District Council v. Millis*,[68] by granting certification the Board acts conclusively. All procedures before certification, such as hearings and elections, are preliminary and tentative.[69] Thus, as long as procedural due process is provided the parties involved, the question of the Board aiding or abetting a discriminatory union in violation of substantive due process should not arise until the certification stage, where substantial federal benefits will be conferred.[70] Substantive due process proscriptions should not affect the preliminary means that the Board choses to utilize in ascertaining the validity of granting certification to a union. Due to demands upon the resources of the Board[71] and the lack of ripeness of the issue before a union wins an election, the decision in *Bekins* to utilize a post-election hearing to aid the Board in ascertaining the validity of conferring certification seems justified.[72]

---

[67] *Id.*

[68] 325 U.S. 697 (1945).

[69] *Id.* at 710.

[70] *See* note 21 *supra.*

[71] The number of representation cases before the NLRB in fiscal year 1973 increased by 3 percent over fiscal year 1972 to a total of 14,590. Representation cases concern, *inter alia*, petitions for decertification, union-shop deauthorization, amendment of certification, and unit clarification. The total caseload for the NLRB for fiscal year 1973 was a record 41,077. 38 N.L.R.B. ANN. REP. 6, 14 (1973). Thus, representation cases comprised about one-third of the total cases that the Board considered. Any unnecessary increase in the number of representation cases, which could result if union membership discrimination charges are permitted before a union wins an election, would therefore add substantially to the case burden that already confronts the NLRB.

[72] 86 L.R.R.M. at 1328. Ostensibly it would seem appropriate that both an employer and a victim of discriminatory policies would have a right to bring a charge against a union to bar certification. The Board expressly stated that an employer has the right to bring an objection to certification on the basis of union membership discrimination policies. *Id.* The Board also provided that § 102.69 of the Board's Rules and Regulations established the procedures to be followed for bringing any such objection. *Id.* Under § 102.69 a Board agent may also bring a charge contesting the validity of union certification. 29 C.F.R. § 102.69(a) (1974). A Board agent is defined as "any member, agent, or agency of the Board, including its general counsel." 29 C.F.R. § 102.2 (1974). Any objection must be filed with the appropriate Regional Director within five days of the tally of election ballots. 29 C.F.R. 169(a) (1974).

The right of a victim of such discrimination to initiate a charge is not clearly

established within the Board's Rules and Regulations, since a victim is not usually a "party" in the context of representation matters. *See* 29 C.F.R. §§ 169(a) and 102.8 (1974). However, under § 102.8 the Board is given wide discretion to determine who may be considered a party, and thus who may bring a charge against a union. 29 C.F.R. § 169(a) (1974). "[A]ny person filing a charge or petition under the act [NLRA]" may be deemed a party and thus permit the valid filing of such a charge. 29 C.F.R. §§ 102.8 and 102.69(a) (1974). Under § 102.65, provision is made also for intervention by any person with a sufficient interest in regard to or objections to election proceedings. 29 C.F.R. § 102.65(b) (1974).

It seems unjustified for a prospective employee, denied membership on invidious grounds, to be required to rely upon the employer to raise the issue, and then seek intervention. Therefore, with its broad discretionary powers the Board should grant a victim "party" status to assert a charge of membership discrimination. The Board does not have affirmative power to correct such discrimination before certification or before recognition of the union by the employer as exclusive bargaining agent. *See* Bekins Moving & Storage Co., 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323, 1325; text accompanying notes 161-167. To deny the victim indirect relief from discrimination such as denial of certification would tend to prevent any remedy for the victim under the NLRA until after certification occurs or until the employer first initiates an objection to certification.

Despite this remedial structure of the NLRA, the individual denied membership is not completely remediless. Under Title VII of the Civil Rights Act, the victim may initiate an action against the union. 42 U.S.C. § 2000e-2(c) (Supp. III, 1973) states:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segreate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer to employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of an individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Id.

Under 42 U.S.C. § 2000e-5 (Supp. III, 1973) provision is made for the filing of a charge by a victim of discrimination against any labor organization violating § 2000e-2(c). The Equal Employment Opportunity Commission (EEOC) then decides if reasonable cause exists to believe that the charge is true. The EEOC then notifies any state authorities who oversee state unlawful employment practices, if the practice leading to the charge occurs within such state. After providing such state aurthorities a reasonable time (not less than 60 days) to act under state law to remedy the practice alleged, the EEOC then attempts to work out a conciliation agreement with the violative labor organization. If within 30 days after the charge is filed or after a reasonable period passes for a state authority to act, the EEOC does not secure from the labor organization a conciliation agreement that is satisfactory, then a civil suit in the appropriate federal district court may be filed. If it is found by the court that the labor organization intentionally engaged or intentionally is engaging in an unlawful employment practice,

A further consideration concerning the denial of certification is the amount and type of evidence of discrimination in union membership practices necessary to invoke such a sanction by the Board. Of critical importance is the usefulness of statistical evidence of the type that the employer in *Bekins* proffered.[73] The question necessarily involves balancing the national interest in furthering the employees' wishes to organize with a similar interest in preventing denial of individual rights on arbitrary and invidious grounds by a discriminatiory union. In *Bekins,* the Board purposely declined to outline standards of evidence sufficient to disqualify a union from certification.[74] The Board acknowledged[75] its inexperience in this newly developing area of labor law. For this reason the Board chose to deal with these issues on a case by case basis rather than attempt to codify, in its rule-making role,[76] a substantive test of evidence sufficient to bar certification.[77] However, on the basis of *Bekins* and subsequent NLRB decisions it is possible to ascertain the nature and quality of evidence which apparently would be sufficient to preclude certification.

In reference to the drastic nature of denying certification to a duly elected union the Board in *Bekins* acknowledged that it would not consider "every possible alleged violation of Title VII . . . as grounds for refusing to issue a certification."[78] The NLRB recognized that correction of such "statutory violations" of the Civil Rights Act[79] will often be better left to the scrutiny of other agencies.[80] The concurring

---

the court may enjoin the labor organization from such a practice and take affirmative action to aid the victim. Such affirmative action includes, but is not limited to, admission or reinstatement to the labor organization, with or without back pay if applicable, and any other equitable relief deemed appropriate. However, if any other reason than race, color, religion, sex, or national origin forms the basis for exclusion, no relief may or can be granted. *Id.*

[73] *See* note 25 *supra.*

[74] 86 L.R.R.M. at 1327.

[75] *Id.* The Board stated,

> [W]e have concluded that we are not yet sufficiently experienced in this newly developing area of the law to enable us to codify . . . our approach to such issues. . . .Courts of appeals have . . . differed with our approach to these matters, and the Supreme Court has, as yet, had little opportunity to clarify . . . our role in this area. . . .

Id.

[76] Authority in the Board to make rules and regulations arises under 29 U.S.C. §§ 151-168 (1970); *see* 29 C.F.R. § 102.135 (1974).

[77] 86 L.R.R.M. at 1327.

[78] *Id.* at 1326.

[79] 42 U.S.C. § 2000e-2(c) (Supp. III, 1974); *see* note 72 *supra.*

[80] The EEOC is the proper agency to handle violations of the Civil Rights Act.

opinion agreed,[81] but further stated that only constitutional issues should be considered, leaving any statutory issues concerning the NLRB to post-certification procedures and any Title VII issues to the EEOC's jurisdiction entirely.[82] In light of the Board's position that it was proscribed by constitutional considerations from certifying a violative union,[83] the concurring opinion's statement that evidence of a constitutional nature was necessary to prevent certification appears justified.[84] Therefore, the crucial inquiry centers upon the type of evidence that can be considered as evidence of a constitutional due process issue in regard to membership discrimination.

In decisions subsequent to *Bekins,* the Board has clarified this evidentiary question. In *Bell and Howell Co.*[85] and *Grants Furniture Plaza, Inc.,*[86] the Board considered objections of employers to certification of unions which allegedly practiced sex discrimination in membership policies.[87] Although these decisions were primarily concerned with the issue of sex discrimination in union membership policies,[88] they helped illustrate the type and sufficiency of evidence

---

The Board stated that the sanctions that agencies, such as the EEOC, could implement might be less drastic than the denial of certification, 86 L.R.R.M. at 1326. *See* note 72 *supra.*

[81] 86 L.R.R.M. at 1329.

[82] *Id.* at 1330.

[83] *See* text accompanying notes 29-33 *supra.*

[84] 86 L.R.R.M. at 1331.

[85] 213 N.L.R.B. No. 79, 87 L.R.R.M. 1172 (1974).

[86] 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175 (1974).

[87] Bell & Howell Co., 213 N.L.R.B. No. 79, 87 L.R.R.M. 1172, 1173 (1974); Grants Furniture Plaza, Inc., 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175, 1176 (1974).

[88] In *Bell & Howell Co.,* the employer brought a sex discrimination charge against the union alleging that there were no female members in the union. 87 L.R.R.M. at 1173. The Board stated that disqualification of the union because of alleged sex discrimination in membership practices was not mandated by either the Constitution or the NLRA. *Id.* at 1174. The dissenting members in *Bekins* were two of the three members of the Board forming a majority in *Bell & Howell.* Their reasons for denying the existence of any constitutional issue to bar certification in regard to sex discrimination were undifferentiated from their reasons in regard to race, alienage, or national origin discrimination. In all such alleged forms of discrimination, these two members of the Board, Members Fanning and Penello, believed inquiry should be made only after certification. *Id.* at 1173; Bekins Moving & Storage Co., 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323, 1331-35 (1974). *See* note 14 and accompanying text *supra.* The dissenting members in *Bell & Howell* were two members of the Board forming part of the majority on the union membership issue in *Bekins. See* notes 11-12 and accompanying text *supra.* In their dissent in *Bell & Howell,* however, these two members viewed the issue of sex discrimination as a constitutional violation of the duty of fair representation, not as a constitutional violation in regard to membership discrimination. 87 L.R.R.M. at 1175. Only the concurring member of the Board in both *Bekins* and *Bell & Howell* confronted the issue of sex discrimination in regard to membership policies

as a basis to deny certification. *Id.* at 1174-75; *see Bekins*, 86 L.R.R.M. at 1330 n.29. By finding sex discrimination, unlike race, national origin, or alienage, not to be a constitutional issue in regard to union membership policies, Member Kennedy helped form the majority in *Bell & Howell.*

Member Kennedy stated that unlike race, alienage, and national origin, discrimination upon the basis of sex has not been determined by the Supreme Court to be "inherently suspect" as a due process violation. 87 L.R.R.M. at 1174. The opinion reasoned that "the Board must satisfy its constitutional responsibilities in a manner which will least interfere with the procedures by which employees select a bargaining representative." *Id.* The conclusion, therefore, was that the Board should consider issues in the area of union membership discrimination "one step at a time" and consider only those issues which it is compelled to consider. Since the Supreme Court deemed that a classification based on sex was not "inherently suspect," the concurring opinion concluded that the Board was not compelled to consider denying certification. *Id.* Member Kennedy also indicated that until the Supreme Court declared sex discrimination "inherently suspect," thus requiring strict judicial scrutiny, the Board should not undertake the task of considering sex discrimination in union membership as grounds to disqualify a union. *Id.* at 1174-75. The same conclusion was reached by Member Kennedy in his concurring opinion in Grants Furniture Plaza, Inc., 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175, 1177 (1974).

The concurring opinions in *Bekins* and subsequent decisions above appear myopic in their reasoning. The dissenting and majority opinions may be even more shortsighted in their failure to recognize or consider sex discrimination in the context of union membership policies as a constitutional issue. *Bekins Moving & Storage Co., supra.* at 1325-26, 1331-35; *Bell & Howell,* 87 L.R.R.M. at 1173-75; *Grants Furniture Plaza, Inc.,* 87 L.R.R.M. at 1176-77. The concurring opinion in *Bell & Howell* stated that an agency of the federal government need not "strike at all evils at the same time," but may one step at a time address itself to problems which seem most acute. 87 L.R.R.M. at 1174. However, the Fifth Circuit decision relied upon to support this proposition, Ray Ballie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973), *cert. denied,* 415 U.S. 914 (1974), dealt with an agency's attempt specifically to *aid* disadvantaged persons, not deprive them of opportunities to better their social and economic position. In the Fifth Circuit decision, the Small Business Administration (SBA) attempted to channel funds to disadvantaged minorities in their quests to start businesses. This maneuver was challenged on the grounds that such action was discriminatory towards other groups or persons seeking loans who did not fall within the disadvantaged minority category. The challenge was also raised on the premise that such action by the SBA was outside the scope of its discretionary powers. *Id.* at 701. The Fifth Circuit stated that such a program was within the discretionary powers of the SBA even though it represents only one step toward the overall purpose of aiding all persons with small business interests. In this context, the court said reform may take only one step at a time. *Id.* at 704-05. Thus, the concurring opinion in *Bell & Howell* attempted to use a rationale meant to *aid* minorities to *deny* women similar aid in the labor field by rejecting sex discrimination considerations as a basis to bar certification.

The concurring opinion's reasoning contravenes decisions of the Supreme Court that state there must be a reasonable basis for distinctions based solely upon sex. In Frontiero v. Richardson, 411 U.S. 677 (1973), the Supreme Court unanimously found two federal statutes unconstitutional because the sole justification for discrimination against women was "administrative convenience." *Id.* at 688. *See* 37 U.S.C. §§ 401, 403 (1970), *as amended,* (Supp. III, 1973) (originally enacted as Act of Sept. 7, 1962, Pub. L. No. 87-649, §§ 401, 403, 76 Stat. 469-73); 10 U.S.C. §§ 1072, 1076 (1970) (originally enacted as Act of September 2, 1958, ch. 55, §§ 1072, 1076, 72 Stat. 1446-

of discrimination based upon race, alienage, or national origin, that the Board will recognize as requiring denial of certification.

In both decisions, the employers offered statistical data to substantiate charges of membership discrimination by the unions.[89] Furthermore, in *Grants Furniture Plaza,* the employer submitted a copy of a Justice Department complaint which alleged that the National Master Freight Agreement of the Teamsters[90] perpetuated prior discriminatory practices of the union.[91] The employer alleged that since

47). These two statutes provided respectively for an increased increment of pay for living quarters and for medical and dental care expenses to a member of the armed services with a spouse. However, a female member of the armed services who supported her spouse was not eligible to receive increased benefits. The Court found the denial based upon the mere convenience of not having to process female members requests an insipid distinction. 411 U.S. at 690-91. Furthermore, the Supreme Court decision in Kahn v. Shevin, 416 U.S. 351, 353-55 (1974), relied upon by the concurring opinion in *Bell & Howell* to support its position, 87 L.R.R.M. at 1174, found a legitimate reason to permit discrimination *in favor of* women to receive a state tax exemption on the basis that women were not able to compete effectively in the job market because of *existing* discrimination against women. When the Board in *Bell & Howell* and prior decisions failed to consider sex discrimination in union membership policies as a basis to bar certification on due process grounds, the Board aided and abetted the *existing* discrimination against women that *Kahn* attempted to alleviate. The Board was aiding discrimination *against* women, not acting in their favor as did the Court in the *Kahn* decision.

The underlying consideration behind the Board's reticence to entertain sex discrimination evidence in certification inquiries appears to be a fear of burdening its administrative caseload with such cases. However, administrative convenience is not a valid or reasonable basis to aid or abet classifications based on sex, as stated in *Frontiero.* 411 U.S. at 690-91. It would seem reasonable therefore that unless a valid "business purpose" related to physical ability or capacity, see note 43 and accompanying text *supra,* or some valid social purpose, see *Kahn,* 416 U.S. at 355, is involved, sex discrimination, like discrimination on the basis of race, alienage, or national origin, should proscribe the Board on due process grounds from conferring certification upon a union guilty of such practices in its membership. Even if the Board, as the concurring opinion stated in *Bell & Howell,* is not to assume the duties of considering Title VII actions, see note 72 *supra,* the Board appears to be in contravention of the above Supreme Court rulings in regard to due process violations resulting from government participation in sex discrimination which has no justifiable purpose.

[89] 87 L.R.R.M. at 1173; 87 L.R.R.M. at 1176, n.2.

[90] The employer contended that the Teamster's Master Freight Plan incorporated a seniority system that continued past discrimination policies against blacks and Spanish surnamed individuals. It did so by providing that these minorities had to give up accrued seniority when transferring to the higher paying jobs of long-distance truck driving from lower-paying local truck driving. The effect was to guarantee that the minorities would not displace white union members of their long-distance positions because they had fewer years of service than the minority members had in short-distance positions. Brief for Respondent at 36, Grants Furniture Plaza, Inc., 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175 (1974).

[91] 87 L.R.R.M. at 1176.

Local 390 of the Teamsters Union subscribed to this agreement, Local 390 also could be considered as guilty of discriminatory practices.[92] The Board dismissed the usefulness of such evidence alone to support an objection to certification.[93]

The Board found that the Department of Justice complaint was no more than a mere allegation of wrongdoing that did not constitute evidence adequate to support an objection, whether in the confines of a representation hearing or in any other context.[94] The Board stipulated that evidence must consist of facts, not mere allegations: "The unproven allegations of a complaint, whether filed by an individual or by a governmental agency do not constitute proof, or even competent evidence, under well-established rules of evidence."[95]

Similarly, the use of statistices showing disparities between the percentages of minorities in a union and of minorities in the surrounding area labor force was deemed, by itself, inadequate to warrant even a hearing to consider disqualification.[96] To constitute sufficient evidence, the statistics had to be used in conjunction with other evidence connecting the union, through a hiring hall or other means,[97] with control over the racial or ethnic composition of those who enter the labor force, and who thereby are or become union members.[98] The Board stated that in the absence of such proof, it is assumed that the employer controls the selection of the labor force, whose members

---

[92] Brief for Respondent at 37, Grants Furniture Plaza, Inc., 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175 (1974).

[93] 87 L.R.R.M. at 1176.

[94] *Id.*

[95] *Id.*

[96] *Id.* The Board stated:

> Nor do we find sufficient to warrant a hearing the evidence offered in the form of statistics purporting to show that the labor organization seeking certification here has a membership in which certain minority groups appear in numbers less than the population ratio of such minorities to the total population in the area in which this labor organization operates.
>
> . . . [W]e conclude that it would be improper to draw any inferences of union propensity for discrimination on the sole basis of such statistical evidence in the instant setting.

Id.

[97] *Id.* A hiring hall gives the union the duty of selecting applicants for employment. Often such a duty is given to unions involved in skilled crafts which will usually require training by the union of the persons it selects for employment. In such a situation, the union quite clearly controls the employment hiring process. *See* ABA LABOR RELATIONS LAW SECTION, THE DEVELOPING LABOR LAW - THE BOARD, THE COURTS AND THE NATIONAL LABOR RELATIONS ACT 712-15 (C.J. Morris ed. 1971).

[98] *Grants,* L.R.R.M. at 1176.

then usually either may join or are required to join a union under an appropriate union-security agreement.[99]

The Board has not yet indicated the sufficiency of evidence necessary to deny certification to a union actively controlling its membership policies. However, the reasonable inference is that statistics *per se* are not objectionable. Rather, to constitute valid evidence of union membership discrimination statistics must be connected to policies of the union itself, and not totally ascribable to an employer. Thus, even where an employer controls the total hiring process, if statistics along with union by-laws or practices indicate conformity or adherence to discriminatory policies, such a union's certification should be subject to scrutiny.[100] The connection of union by-laws or practices with statistical evidence of minority imbalances in membership constitutes a prima facie case of union membership discrimination.[101] Upon the establishment of such a prima facie case of discrimination, the burden would fall on the union to overcome it.[102]

Another evidentiary question in *Bekins* and *Grants Furniture Plaza* concerned ascribing evidence of the national or international union's discriminatory policies to a local union to deny the latter's certification. This is particularly relevant to Local 390 which was involved in both *Bekins* and *Grants Furniture Plaza.* Local 390 is a local union of the InternationalBrotherhood of Teamsters whose

---

[99] *Id.*

[100] *See* the concurring opinion in *Bell & Howell Co.*, 213 N.L.R.B. No. 79, 87 L.R.R.M. 1172, 1174 (1974): "There is no allegation that [the union's] constitution or bylaws deny membership to females." *Id.*

[101] *See* Turner v. Fouche, 396 U.S. 346 (1970). In *Turner,* the Supreme Court found the substantial disparity between percentages of black residents in a county and of blacks on a newly constituted jury list to be a *prima facie* showing of discrimination. The jury commissioners in charge of the selection process controlled the composition of the jury list, and were shown to have departed from objective considerations in formulating the list. *Id.* at 360. Similarly, if it can be shown that a union departed from objective criteria in its membership selection process in conjunction with a substantial disparity between the percentage of minorities in the union membership and of the surrounding labor force, then a *prima facie* case of union membership discrimination would exist. *See* NLRB v. Mansion House Center Management Corp., 473 F.2d 471, 475-77 (8th Cir. 1973).

[102] In *Bekins Moving & Storage Co.*, 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (1974), the Board stated:

> If upon a *prima facie* showing of such an exclusion, the labor organization can demonstrate that its recruitment or admission policies are non-discriminatory then there appears to be no constitutional impediment to its certification.

Id. at 1330; *see* Turner v. Fouche, 396 U.S. 346, 360 (1970); NLRB v. Mansion House Center Management Corp., 473 F.2d 471, 477 (8th Cir. 1973).

"Master Freight Plan"[103] has been the center of discrimination charges in other decisions.[104] Furthermore, Local 390 was a signatory party to the Master Freight Plan.[105] Where a direct connection can be made between local union membership policies and such national agreements, supporting evidence of union membership discrimination will exist.[106] Such proof could further substantiate existing evidence of a local union's propensity to discriminate in membership policies. However, in light of the *Grants Furniture Plaza* and *Bell & Mowell* decisions, the connection between local union and national or international union practices must be more substantial than a mere allegation.[107]

Membership discrimination by a union in regard to race, national origin, and alienage proscribes the Board from certifying a union on due process grounds. The Board recognized this in *Bekins,* but refused to include sex discrimination policies within the due process proscription. With respect to the types of discrimination that the Board deemed "invidious" under the due process clause, the employer must overcome the prima facie eligibility of a union for certification after victory in an election[108] by proving that the union has discriminated in its membership policies. The burden is then transferred to the union to overcome such a prima facie case by showing that its admission or recruitment policies are non-discriminatory.[109] In light of the extreme importance of certification to a union, it seems likely that the *Bekins* decision will serve to encourage non-discriminatory membership practices by labor unions.[110]

However, the import of *Bekins* cannot be restricted to its stand on membership discrimination, for union membership discrimination represented only one of two possible "constitutional" issues involved in the decision.[111] Two members of the Board, who formed part of the

---

[103] *See* note 90 *supra.*

[104] *See, e.g.*, Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied,* 401 U.S. 954 (1971); Sabala v. Western Gillette, Inc., 362 F. Supp. 1142 (S.D. Tex. 1973).

[105] Brief for Respondent at 37, Grants Furniture Plaza, Inc., 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175 (1974).

[106] *See* Grants Furniture Plaza, Inc., 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175, 1176 (1974).

[107] As the Board stated, "[e]vidence must consist of facts, not mere accusations which yet remain to be proven." *Id.*

[108] Bekins Moving & Storage Co., 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323, 1327 (1974).

[109] *Id.* at 1330; *see* note 101 *supra.*

[110] *See* note 164 *infra.*

[111] Before embarking upon analysis of the second possible constitutional issue involved in *Bekins,* the duty of fair representation, it seems appropriate to note the total absence in *Bekins* of any discussion relating to first amendment rights and union

membership. The Board failed to take cognizance of numerous cases concerning the basic "freedom of association" issue in denying union membership to a person on an arbitrary basis. It should be recognized that, like the fifth amendment, the rights guaranteed by the first amendment cannot be interferred with nor can interference with those rights be sanctioned by the federal government or the states. Public Util. Comm'n v. Pollak, 343 U.S. 451, 461 (1952) (proscription on federal government); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (proscription on state government). Also, although first amendment rights are most frequently concerned with political and civil principles, it is not sound to state that those rights are inapplicable to business or economic activity. Thomas v. Collins, 323 U.S. 516, 531 (1945). The prerogative to join or to organize a union is such an economic activity. *Id.* The right to form or join a union was not originally established by the NLRA. As the Supreme Court noted, "the right to organize and select representatives for lawful purposes . . . has [been] characterized as a 'fundamental right' and . . . was recognized as such . . . long before it was given protection by the National Labor Relations Act." UAW, Local 232, v. Wisconsin Employment Relations Board, 336 U.S. 245, 259 (1949), *citing* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937). In *Jones & Laughlin* the Court cited § 7 of the NLRA (enumerating the basic right of employees to organize, to form, or to *join* a labor organization) and stated that the NLRA "goes no further than to safeguard the right of employees to self-organization. . . .[t]hat is a fundamental right." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

The policy behind the right of an employee to form or to join a union is that a single employee is less able to bargain in equal power with an employer. As the Court stated, "union was essential to give laborers opportunity to deal on an equality with their employer. . . . [S]uch collective action would be a mockery if representation were made futile by interference with *freedom of choice.*" *Id.* at 33-34. (Emphasis added). Although the Court was referring to the denial of the right to organize or to join a union by the employer, these principles are logically applicable to denial of union membership by a union to a person seeking such a membership. This is apparent in the Fourth Circuit's decision in *United States v. International Longshoremen's Ass'n,* 460 F.2d 497 (4th Cir.), *cert. denied,* 409 U.S. 1007 (1972).

In enforcing the merger of two segregated locals into one integrated local, which both officials of the black and white locals opposed, the Fourth Circuit stated:

> The order does no more than prohibit exclusion from association on the ground of race. There is no warrant in the Constitution for a union to retain, even by majority preference, racially segregated locals that tend to deprive some black members of equal employment opportunities . . .
>
> The district court's order does not conflict with *NAACP v. Alabama* and *Thomas v. Collins* on which the union primarily relies. These cases do not create a right in white men or black men to avoid association with persons of other race. *On the contrary they are leading authorities charting the right of all persons to associate for political and economic goals.* (Citations omitted).

Id. at 501. (Emphasis added). First amendment protection of the right to join a union was recognized by decisions of various district courts as well. Bateman v. South Carolina State Ports Authority, 298 F. Supp. 999, 1003 (D.S.C. 1969); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

Thus, the NLRB, as an agency of the federal government, is proscribed from interfering with or aiding the interference of a person's right of association to join a union. The same tests which govern exceptions to due process violations should be applicable to possible freedom of association violations. *See* text accompanying notes 42-46 *supra.* Recognition of these first amendment considerations in *Bekins* would have

majority in *Bekins,* believed that evidence of a union's discrimination in regard to members or membership practices violated the union's duty of fair representation.[112] These members concluded that the duty of fair representation was constitutional in nature, separate and distinct from the constitutional issue involved in union membership discrimination.[113]

However, the concurring and dissenting opinions disagreed with the position that the duty of fair repesentations was constitutional. Instead, these members of the Board stated that the duty was statutorily derived from the NLRA.[114] Unlike the opinion, which suggested that a breach of the duty of fair representation warranted denial of certification on constitutional grounds,[115] the concurring and dissenting opinions, which formed the majority on this issue, believed that such a breach should be considered only after certification.[116] Whether the duty of fair representation is constitutional or nonconstitutional is, therefore, critical to any determination as to when the claim may be raised. If the duty is constitutional, then the basis for denying certification is expanded to include not only membership discrimination, but also discrimination against present members or

---

further substantiated the necessity and justification of denying certification to a union which invidiously discriminates on the basis of race, sex, alienage, or national origin in membership policies.

[112] Bekins Moving & Storage Co., 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323, 1326 (1974); *see* note 12 *supra.*

[113] 86 L.R.R.M. at 1326. The two members of the Board ascribing a constitutional aspect to the duty of fair representation stated:

> Nor can we constitutionally certify a union which is shown to have a propensity to fail fairly to represent employees. Our constitutional considerations may, in this respect, be somewhat broader than those expressed by Member Kennedy [the concurring member of the Board]. For we understand the duty of fair representation to be rooted in the Constitution as well as the statute [NLRA].

Id.

[114] *Id.* at 1330-31, 1332. For a discussion of the differing interpretations between the concurring and dissenting opinions in regard to whether the duty of fair representation may ever be constitutional in nature, see note 18 *supra.*

[115] *See* note 113 and accompanying text *supra.*

[116] 86 L.R.R.M. at 1330-31, 1332. The concurring opinion stated:

> I would not undertake a precertification inquiry with respect to a potential breach of a union's duty of fair representation. Unlike my colleagues, I do not consider the duty of fair representation to be a constitutional obligation. Rather, I view it as an obligation imposed by a statute as a corollary to a labor organization's being granted exclusive representative status.

Id. at 1330; *see* note 17 *supra.* The dissenting opinion's comments are set out in note 14 *supra.*

employees that the union does or is required to represent.[117] Also, issues as to expanded types of evidence and more lenient sufficiency of evidence rules arise since decisions acknowledge the admissibility of mere statistical evidence in Title VII cases to support allegations of unfair representation.[118] On the other hand, if the duty is non-constitutional, then consideration of any evidence of a violation of the duty does not arise until after certification because only constitutional issues can possibly deny certification.[119]

In asserting the constitutional nature of the duty of fair representation the two members of the Board in *Bekins* relied[120] on two court decisions, *Local 12, United Rubber Workers v. NLRB*[121] and *Steele v. Louisville & Nashville R.R.*[122] However, analysis of these cases tends to confirm the opinions of the remaining members of the Board that the duty of fair representation, in the context of such decisions as *Bekins*,[123] is statutory, and not constitutional. For instance, in *United Rubber Workers* the Fifth Circuit declared a union's failure to process union members' grievances in regard to segregated food and health facilities to be an unfair labor practice.[124] In declaring the

---

[117] *See* text accompanying notes 144-46 *infra.*

[118] *See* NLRB v. Mansion House Management Corp., 473 F.2d 471, 476-77 (8th Cir. 1973).

[119] *See* text accompanying notes 9-20 *supra.*

[120] 86 L.R.R.M. at 1326. Apparently, consideration of the duty of fair representation as a constitutional issue emerged from the Board itself, as the employer's brief stated no such contention specifically. *See* Brief for Respondent at 29-30, Bekins Moving & Storage Co., 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (1974). The dissent made note of this fact in its opinion in questioning the wisdom of the Board's position on this issue. 86 L.R.R.M. at 1332 n.34.

[121] 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967).

[122] 323 U.S. 192 (1944).

[123] In the ensuing discussion, it should be remembered that the question raised by the Board is whether a breach of the duty of fair representation should bar certification. The issue is not whether the NLRA provides for such a duty on the part of a certified or recognized union.

[124] 368 F.2d at 24. The particular unfair labor practice that the breach of duty of fair representation resulted in *United Rubber Workers* was a violation of § 8 (b)(1)(A) of the NLRA, which states:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [§ 157 of this title. . . .]

29 U.S.C. § 158(b)(1)(A) (1970). Section 157 states the rights and privileges of an employee in regard to a labor organization:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing,* and to engage in other concerted activi-

breach of the duty of fair representation to be an unfair labor practice, the court stated that since an employee completely surrenders his right of self-representation to a bargaining agent, "logic and equity" demand that such agent have a "reciprocal duty" to represent fairly any such employee.[125] The court cited *Steele v. Louisville & Nashville R.R.* for the proposition that if the NLRA did not demand such a reciprocal duty of the representative, then serious questions as to the constitutionality of the NLRA itself would arise.[126] The duty of fair representation *per se* was not a constitutional issue. Rather, the absence in the NLRA of any provision for such a duty or remedy for its breach represented the constitutional issue. This proposition is supported upon examination of the Supreme Court's decision in *Steele.*

The Court in *Steele* overruled a state court decision which allowed the bargaining representative to negotiate for employees without a commensurate duty of fairly representing all of those employees.[127] The Court explained that either the statute[128] was unconstitutional in not providing for such a reciprocal duty or that the state court erred in failing to enforce the reciprocal duty within the statute. Mr. Chief Justice Stone stated that Congress, in creating the exclusive bargaining right in the representative union by statute, implicitly imposed a reciprocal duty on the union to represent fairly all employees.[129] The constitutional issue, whether the statute provided for the duty of fair representation was therefore resolved in favor of the con-

---

> ties for the purpose of collective bargaining or other mutual aid or protection. . . .

29 U.S.C. § 157 (1970) (emphasis added). The arbitrary denial of grievance procedures to the employees on the basis of race represented a deprivation of the employees' right to "bargain collectively through representatives of their choosing." 368 F.2d at 17.

[125] 368 F.2d at 16-17.

[126] *Id.*

[127] The union in *Steele* discriminated against blacks in terms of making a collective bargaining agreement that denied the blacks the possibility of promotion to more lucrative positions with the railroad employer. The bargaining agreement gave white members of the union priority for the better paying jobs with better working conditions. The Court found this to be a violation of the duty of fair representation imposed upon the bargaining representative as exclusive bargaining agent for the employees. 323 U.S. at 196-97, 208.

[128] Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1970). The provisions of this statute in terms of representative duties and functions are nearly identical to those under the NLRA. In the present discussion concerning the question of constitutionality of the duty of fair representation the two statutes are equally applicable. *See* Local 12, United Rubber Workers v. NLRB, 368 F.2d 17 (5th Cir. 1966). *See also* notes 129-30 *infra.*

[129] 323 U.S. 198-99. This reasoning was made applicable to the NLRA by the Supreme Court in *Ford Motor Co. v. Huffman,* 345 U.S. 330, 337 (1953).

stitutionality of the statute. The state court was in error for failing to enforce the reciprocal statutory duty of fair representation.[130]

Thus, in the context of a pre-certification proceeding as in *Bekins,* questions as to a union's violation of the duty of fair representation should not magically become constitutional in nature. In any challenge to certification, the Board would still be constrained to determine if a violation of the statutory duty exists. However, as the Board recognized, only a constitutional violation proscribes certification.[131] It should be further noted that the duty of fair representation only arises when a union is the exclusive bargaining agent for a group of employees.[132] Until certification occurs, the union does not derive the benefit from being established as the exclusive representative.[133]

Nevertheless, the argument was raised in *Bekins* that certification is not the only means by which a union can become an exclusive bargaining representative.[134] Concededly, a union may be recognized

---

[130] 323 U.S. at 202-03. The Court said:

> We hold that the language of the Act . . . read in light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

Id. The statutory nature of the duty of fair representation was further substantiated in subsequent Supreme Court decisions. Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953). *See also* Vaca v. Sipes, 386 U.S. 171, 176-77 (1967) where the Court stated:

> It is now well established that, as the exclusive bargaining representative of the employees . . . the Union had a *statutory* duty to represent all of those employees, both in collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement . . . The *statutory* duty of fair representation was developed over 20 years ago in a series of cases involving racial discrimination by unions certified as exclusive bargaining representative under the Railway Labor Act . . . and was soon extended to unions certified under the N.L.R.A. . . . Under this doctrine, the exclusive agent's *statutory* authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all *members* without hostility or discrimination toward any. . . .

Id. at 177 (emphasis added) (citations omitted).

[131] *See* text accompanying notes 30-46 *supra.*

[132] *See* note 130 *supra.*

[133] *See* note 21 *supra.*

[134] 86 L.R.R.M. at 1326-27. Two members of the Board in the majority stated:

> Our colleagues apparently assume that the prohibition against discrimination does not reach a union until it is certified. Steele teaches us to the contrary, that it is the union's power to bargain for all by virtue of the statute which brings the prohibition into effect, and the duty of fair representation has never been limited to certified unions.

Id.

by the employer as the exclusive bargaining agent.[135] However, it is difficult to imagine that an employer would desire to challenge certification to a union and, at the same time, recognize that union as the exclusive bargaining representative of the employees. Thus certification, in the context of cases like *Bekins,* would seem to be the only means for a union to achieve exclusive bargaining representative status. Therefore, any issue relating to a breach of duty of fair representation would seem appropriate only after certification.[136]

Two members of the Board in *Bekins* additionally attempted to justify consideration of unfair representation issues at the certification hearing by contending that a union should not be provided with further opportunity to represent employees unfairly.[137] However, as the Eighth Circuit stated in *Mansion House,* an employer's claim that a union should not be certified because the union will commit future abuses, such as an unfair representation practice,[138] is premature.[139] "The mere possibility of future abuse is no justification" for finding a present violation of the NLRA.[140] Likewise, a charge of breach of the duty of fair representation in regard to union membership discrimination is premature.[141] The duty does not concern those persons that a union does not yet represent.[142] Furthermore, since the Board recognized that only due process considerations warranted denial of certification, the issue of a potential breach of the statutory duty of fair representation as to present or prospective employees is irrelevant to certification considerations.[143]

As stated previously, the scope of considerations that could lead to denial of certification will depend upon whether the issue of fair repesentations is constitutional or non-constitutional.[144] Since the duty of fair representation appears to be statutory and arises only after certification, the grounds for denial of certification should be

[135] *See e.g.,* United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62, 71-72 (1956) (authorization cards); NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318, 338-39 (1940) (authorization cards).

[136] 86 L.R.R.M. at 1331.

[137] *Id.* at 1326.

[138] *See e.g.,* the unfair representation issue in Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966); note 124 and accompanying text *supra.*

[139] 473 F.2d at 472 n.1.

[140] *Id. citing* Minnesota Mining & Mfg. Co. v. NLRB, 415 F.2d 174, 178 (8th Cir. 1968.)

[141] *See* text accompanying notes 127-33 *supra.*

[142] 86 L.R.R.M. at 1326. The Board acknowledged that "it can be said that the [union] lacks the capacity to discriminate against those it does not represent and, in this sense, a certification imposes additional responsibility." *Id.*

[143] *See* text accompanying notes 24-33, 127-33 *supra.*

[144] *See* text accompanying notes 122-26 *supra.*

narrowed exclusively to evidence of invidious discrimination in union membership policies.[145] Thus, evidence relevant to a breach of the duty of fair representation is germane only to an unfair labor practice charge brought after certification, and not a precertification hearing. The admissibility of Title VII evidence in regard to unfair representation practices would appear to be precluded from consideration in a precertification hearing.[146]

A final consideration raised by the dissent with respect to both membership discrimination and fair representation issues involves the relevancy of Title VII of the Civil Rights Act. More precisely, the question raised with respect to both issues was whether Title VII undermined action by the NLRB in regard to union discrimination issues.[147] The dissenting members of the Board expressed the belief that NLRB involvement in proscribing union discrimination in membership practices would undercut administration of the Civil Rights Act.[148] The majority opinion, while expressing concern to avoid encroachment upon the congressional mandate behind the EEOC, stated that the NLRB was not undertaking affirmative corrective action that the EEOC would provide.[149] The Board, rather than using injunctive powers, would merely withdraw the availability of its processes from a union that was promoting discriminatory practices and would not be acting affirmatively.[150] Therefore as to the constitutional issues involved in union membership discrimination, the position of the majority in *Bekins* is justified since encroachment upon EEOC jurisdiction does not appear to be a serious consideration.[151]

However, as to a breach of the statutory duty of fair representation,[152] the question of preemption by the Civil Rights Act is considerably more relevant. In *United Packinghouse Workers v. NLRB,*[153] the United States Court of Appeals for the District of Columbia discussed in detail the non-preemptive nature of the Civil Rights Act with respect to the NLRA and its unfair representation procedures.[154] As

[145] This conclusion leaves to Board consideration in the precertification hearing only such evidence that pertains to membership discrimination, the type and sufficiency of which was discussed in the text accompanying notes 73-110 *supra.*

[146] *See* note 118 and accompanying text *supra.*

[147] *See* notes 20 and 72 *supra.*

[148] 86 L.R.R.M. at 1332.

[149] *Id.* at 1325; *see* note 72 *supra.*

[150] *Id.*; 29 U.S.C. § 160 (1970).

[151] *See* notes 118, 145, and 146 and accompanying text *supra.*

[152] *See* text accompanying notes 15-20 *supra.*

[153] 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 903 (1969).

[154] *Id.* at 1133-34 n. 11. *See also* NLRB v. Mansion House Management Corp., 473 F.2d 471, 475-77 (8th Cir. 1973); Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 24 n.24 (5th Cir. 1966).

the court stated, there was no language in the Civil Rights Act to oust the NLRB from jurisdiction over matters relating to discrimination in labor relations,[155] though Title VII outlines procedures to deal with employers and unions violating the equal opportunity law.[156] The court noted that a Senate amendment was proffered to make the provisions of Title VII "the exclusive means of relief for such practices, depriving 'any department, agency, or instrumentality in the executive branch of the Government, or any independent agency of the United States' from granting relief."[157] However, the amendment was defeated in a subsequent Senate vote.[158] The court further explained that it may be to the advantage of a person aggrieved by discrimination to use the NLRB rather than the EEOC since the NLRB bears the expense of enforcing the NLRA, offers general advantages of administrative enforcement, has a shorter case backlog time than the federal courts, and has no express requirement to defer to state agencies.[159]

The legislative history and the subsequent case law developed under the NLRA and Civil Rights Act attest to the mutually nonpreemptive nature of those acts.[160] A person who is discriminated against in either union membership policies or union representation policies on the basis of race, sex, religion, or national origin may seek relief under the Civil Rights Act.[161] Discrimination on the basis of race, sex, religion, or national origin by a union in violation of a duty

---

[155] 416 F.2d at 1133-34 n.11.

[156] *See* note 72 *supra.*

[157] 416 F.2d at 1133 n.11 *citing* 110 CONG. REC. 13,650-52 (1964).

[158] *Id.*

[159] 416 F.2d at 1133 n.11 *citing* Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations,* 34 GEO. WASH. L. REV. 846, 887 (1966).

It should be noted that in 1973, the NLRB regional offices, with which unfair labor practice complaints are filed, processed cases from date of filing the complaint in a median of 51 days. 38 N.L.R.B. ANN. REP. 12 (1973).

Also a victim of unfair representation may simultaneously file petitions for relief before the EEOC and NLRB for the same violation. Guerra v. Manchester Terminal Corp., 350 F. Supp. 529, 531-32 (S.D. Tex. 1972). However, where a complaint is filed with the EEOC or the NLRB and an adverse decision is rendered, the complainant is barred from subsequently bringing the same charge before the other agency. Hutchings v. United States Indus., Inc., 309 F. Supp. 691, 693 (E.D. Tex. 1969).

The availability of multiple forums provides not only protection for the individual employee, but also tends to enhance vindication of the public policy to see that Title VII and labor relations violations are corrected. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Vaca v. Sipes, 386 U.S. 171 (1967).

[160] United Packinghouse v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969); *see* text accompanying notes 153-58 *supra.*

[161] *See* note 72 *supra.*

of fair representation appears subject to the remedial procedures of the NLRB as well.[162] However, as to discrimination in union membership policies, the basis upon which action will be taken appears to be limited to racial or ethnic issues[163] and results only in the denial of certification. There is no specific relief for the victim *per se* before the NLRB in regard to union membership discrimination, since an employer or Board agent[164] are the only parties which clearly have standing to initiate action against a union. However, even though the victims of such discrimination may fail to receive direct relief in such actions,[165] the threat of denial of certification to a union may have the ultimate effect of terminating such discrimination.[166] Unions may well prefer to end discriminatory membership policies rather than suffer the setback of disqualification.[167]

The decision in *Bekins* represents the opening of a broad new field of inquiry for the NLRB. The Board in *Bekins* appeared to be justified in finding a due process prohibition on the NLRB to certify a union discriminating on the basis of race, alienage, or national origin in membership policies.[168] However, in attempting to establish the duty of fair representation as a constitutional issue, certain members of the Board seemed to have misinterpreted the basic statutory nature of the duty of fair representation. The duty cannot exist, as the concurring opinion stated, until the benefit of exclusive representation is received through certification.[169] Therefore, any evidence of violations of the duty of fair representation should be considered only after certification is conferred and cannot be used as a basis to deny certification.[170]

---

[162] 87 L.R.R.M. at 1117; 86 L.R.R.M. at 1330-31.

[163] 86 L.R.R.M. at 1329; *see* note 7 *supra.*

[164] *See* note 72 and accompanying text *supra.*

[165] "Direct relief" applies to such remedies as those within the power of the courts under the Civil Rights Act to order a labor organization to accept into its membership a person excluded on the basis of race, color, religion, sex, or national origin and to make available other appropriate relief. *See* note 72 *supra.*

[166] As noted by Dean Sovern, nothing could prevent the unions from striking to force an employer to bargain with them when the unions have the majority support of a group of employees. However, pressures from the international and national unions could force any violative local unions into line. Such pressure might be exerted because of the disruptive effect on organizational activities that denial of certification represents. In the face of such disruption, compliance with non-discriminatory procedures would prove the easier alternative. Sovern, *The National Labor Relations Act and Racial Discrimination,* 62 COLUM. L. REV. 563, 607-08 (1962).

[167] *Id.*

[168] 86 L.R.R.M. at 1325, 1329. *See also* note 88 *supra* concerning the issue of sex discrimination in regard to denial of certification.

[169] *See* text accompanying notes 112-133 *supra.*

[170] *See* text accompanying notes 144-46 *supra.*

With disqualification of a union from certification on the basis of invidious discrimination in membership policies, increased challenges from employers is a certainty.[171] The Board has however, within its discretion the right to dismiss such a charge when the claim appears frivolous or without factual substance.[172] However the number of legitimate charges will increase until unions respond affirmatively and terminate any discriminatory membership practices.

THOMAS PACE

[171] *See* note 22 *supra.*
[172] 29 C.F.R. § 102.67 (1974).